TEE LIAM TOH v. NATIONAL EMPLOYER'S MUTUAL GENERAL INSURANCE ASSOCIATION LTD.

[O.C.J. (Ong J.) June 30, 1964]

[K.L. — Originating Motion No. 50 of 1963]

Arbitration — Dispute between insured and insurers — Submission to arbitration — Whether insurers estopped once liability of insured is established.

Insurance — Claim against insured — Insured repudiating liability — Insurers failing to defend — Insured held liable on arbitration — Insured claiming to be indemnified by insurers — Whether insurers bound to pay.

Workmen's Compensation — Claim by dependants of deceased employee — Matter referred to arbitration — Employer claiming to be indemnified by insurers — Workmans Compensation Ordinance, 1952, ss. 27, 30.

The applicant took out a workmen's compensation policy with the respondents to cover certain employees against personal injury by accident or disease arising out of and in the course of their employment. The applicant's driver, while about to load some goods collapsed and died of heart failure. The dependants of the deceased driver made their claim under the Workmen's Compensation Ordinance against the applicant as employer but as he repudiated liability, no agreement was reached at an inquiry held by the Commissioner for Labour under section 27 of the Ordinance. The matter was then referred to the President of the Sessions Court as arbitrator pursuant to section 30 of the said Ordinance. The President made an award against the applicant. The applicant claimed to be indemnified by the respondents who resisted the claim on various grounds and invoked the arbitration clause in the policy. In this arbitration the arbitrator one LPT in answer to the questions raised for his decision in his award found as follows: (a) the driver's death was due to natural causes; (b) the injury did not arise out of and in the course of his employment; (c) the deceased was covered by the policy; (d) the insured had committed no breach of condition 2 of the policy i.e. the condition relating to notice; and (e) the respondents were not liable to indemnify the insured.

The applicant moved the court to have the award by the arbitrator LTP remitted to him for reconsideration or set aside.

Held: (1) once the applicant's liability had been established by a competent tribunal namely the President of the Sessions Court as arbitrator the respondents were precluded from raising the very same questions again before LTP the said arbitrator and nothing remained but for the respondents to pay;

(2) the only matter in difference which really fell to be decided by the arbitrator LPT was whether or not the applicant as the insured was in breach of any of the conditions of the policy particularly condition 2 which would disentitle him to the indemnity under the policy. There was therefore an error on the face of the award by LPT the arbitrator in not giving effect to the estoppel. The award should be remitted to LTP for reconsideration.

Case referred to:—

(1) *Parker* v. *Lewis* L.R. 8 Ch. App. 1035, 1059.

MOTION.

Kam Woon Wah for the applicant.

Alexander Y. L. Lee for the respondent.

Cur. Adv. Vult.

Ong J.: By this motion the applicant seeks to have an award by an arbitrator remitted to him for reconsideration or set aside.

The applicant, a merchant, was the owner of a motor lorry. On November 7, 1960 he took out a workmen's compensation policy with the respondents, to cover the driver and lorry-attendant in his employ against personal injury by accident or disease arising out of and in the course of their employment. On November 9, while in Kuala Lumpur, about to load some goods, the driver collapsed and died of heart failure.

In due course the dependants of the deceased driver made their claim under the Workmen's Compensation Ordinance against the applicant as employer. Since he repudiated liability, no agreement was reached at the inquiry held by the Commissioner for Labour under section 27 of the Ordinance. Thereupon the questions in issue fell to be decided by the President of the Sessions Court, Kuala Lumpur, as arbitrator, pursuant to the provisions of section 30. The learned president gave his award on November 6, 1960, against the applicant and ordered payment of $5,400 by way of compensation and $30 costs.

The applicant then claimed to be indemnified by the respondents. The insurance company resisted this claim on various grounds and invoked the arbitration clause, which was one of the conditions of the policy, providing that all differences arising out of such policy should be referred to arbitration. The applicant, as insured, was of course bound to agree to an arbitration.

By a submission in writing the matters in difference, referred to the arbitration of Mr. L. P. Thean, a practising advocate and solicitor, were as follows:

(a) Whether the workman Tee Liam Toh alias Tee Lian Jiew now deceased met his death as a result of any accident or his death was due to natural causes;

(b) Whether the injury caused to the said deceased workman arose out of and in the course of his employment;

(c) Whether the said deceased workman was covered by the Policy No. F-54707;

(d) Whether the first party has committed a breach of condition 2 of the Policy of Insurance;

(e) Whether the second party should indemnify the insured in the sum of $5,400.00 and costs of $30.00 awarded by the Arbitrator in the Sessions Courts at Kuala Lumpur.

In his award the arbitrator found (a) that the driver's death was due to natural causes; (b) that the injury did not arise out of and in

the course of his employment; (c) that the workman was covered by the policy; (d) that the insured had committed no breach of condition 2 of the policy (e) that the company was not liable to indemnify the insured.

Being dissatisfied with this award the applicant now moves the court to have it remitted to the arbitrator for his reconsideration or set aside.

In my opinion the matters which ought properly to have been referred to arbitration were misconceived by the legal advisers of both parties. The only matter in difference which really fell to be decided was whether or not the applicant, as the insured, was in breach of any of the conditions of the policy, particularly condition 2, which would disentitle him to the indemnity under the policy. On that point, the finding of the arbitrator was in the applicant's favour.

Condition 2 reads as follows:

"The insured shall give notice in writing to the association as soon as possible after the occurrence of any accident or disease (to which this policy relates) with full particulars thereof. Every letter claim writ summons and/or process shall be notified or forwarded to the association immediately on receipt. Notice shall also be given in writing to the association immediately the insured shall have knowledge of any impending prosecution or inquest in connection with any accident or disease for which there may be liability under this policy."

This finding meant that, with full notice of a claim against their insured, the insurance company elected to lift not a finger to assist their insured or protect themselves by defending the claim. Under condition 3 they had the right to take over conduct of the defence against the claim put forward by the dependants of the deceased, and, if dissatisfied with the decision, they should have appealed. Having left their insured to carry the burden, they nevertheless subsequently insisted on raising the very same questions before the arbitrator which had already been decided by a competent tribunal against their insured. Of course, they are precluded by the decision of the learned President, as arbitrator, from agitating these questions again.

The law is stated in 15 *Halsbury* (3rd Edition) on page 199, as follows:

"In certain cases, though there is in strictness no privity between a party to a judgment and the person against whom it is set up, the relations between them are such that the latter is not allowed to dispute it. There is no privity of estate between the parties to a contract of indemnity or between a surety and the principal debtor or his trustee in bankruptcy; but a person who has covenanted to indemnify another against liabilities and actions in respect thereof is, as between himself and the party indemnified, estopped from disputing the judgment in an action against the party indemnified, which has been defended with the knowledge and approval of the covenantor, not because the covenantor is a privy, but because that is the true meaning of the contract."

The workmen's compensation policy is a case of liability insurance and, under the terms thereof, the insurers are liable to indemnify their insured if he shall be liable to pay compensation himself. In the instant case, once the applicant's legal liability had been finally established by a competent tribunal, nothing remained but for the respondents to pay. As Mellish L.J. said in *Parker* v. *Lewis*: (1)

"I think that the law with reference to express contracts of indemnity is, that if a person has agreed to indemnify another against a particular claim or a particular demand, and an action is brought on that demand, he may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity. On the other hand, if he does not choose to trust the other person with the defence to the action, he may, if he pleases, go on and defend it, and then, if the verdict is obtained against him, and judgment signed upon it, I agree that at law that judgment, in the case of express contract of indemnity, is conclusive."

In the instant case I think that Mr. Thean as arbitrator was placed in a quandary because the submission raised five specific questions which he had to answer. Even though the first two were entirely irrelevant, he was not at liberty to ignore them because he had to determine all the differences which the parties by their submission had referred to arbitration. In the result, there clearly was an error on the face of the award in not giving effect to the estoppel, even though it might have been due to inadvertence all round.

In the circumstances I find myself somewhat in difficulty as to the order which I should make on this motion. I think the only practical solution is not to set aside the award because, in part at least, it should stand, namely, as to questions (c) and (d). As to the rest, I think that the award should be remitted to the arbitrator for reconsideration, rather than set aside, since estoppel on questions (a) and (b) must necessarily reverse the award on question (c) and the directions as to costs, which ought to follow the event. I make the order accordingly, with costs of this motion against the respondents, to be taxed.

Order accordingly.

Solicitors: *Kam Woon Wah & Co.*; *Skrine & Co.*